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In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. 773

JOSEPH A. F. VALENTI,

Appellant,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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The Appellant, pursuant to Rules 13 (2) and 15 of the Supreme Court of the United States, files this statement as to jurisdiction to contend that this Court has jurisdiction on direct appeal to review the final order dismissing plaintiff's complaint for an injunction and declaratory relief, and to secure an order of this court noting probable jurisdiction in this case.

Opinions Below

The district court delivered two opinions in this case. The majority opinion, written by the Hon. J. EDWARD LUMBARD, Chief Judge of the United States Court of Appeals for the Second Circuit, dismissed the complaint.

The Hon. JOHN O. HENDERSON, Chief Judge of the United States District Court for the Western District of New York, concurred with Chief Judge Lumbard. The dissenting opinion, written by the Hon. MARVIN E. FRANKEL, United States District Judge in the Southern District of New York, sustained the complaint. Both opinions, pursuant to Rule 15 (1) (h) are appended hereto and marked as Appendix "A". There is no official citation as yet to these opinions.

Jurisdiction

The appeal herein is from a final order dismissing the plaintiff's complaint made and entered in the United States District Court for the Western District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, Section 2281 and 2284.

(i.) The Complaint sought declaratory and injunctive relief against the provisions of Section 296 of the Election Law of the State of New York for repugnance to the provisions of the Seventeenth Amendment to the Constitution of the United States and Article 4, Section 4 which guarantees to each state a republican form of government. The Complaint rested on 42 United States Code 1983 and 1988, the Civil Rights Act.

(ii.) The final order dismissing the complaint from which this appeal is taken was made and entered on November 13, 1968. Notice of Appeal was filed on November 18, 1968 in the United States District Court for the Western District of New York.

(iii.) The Supreme Court of the United States has jurisdiction to review by direct appeal the final order above cited pursuant to the terms of 28 United States Code, Section 1253.

(iv.) The following decision sustains the jurisdiction of the Supreme Court to review this order on direct appeal. *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

(v.) The validity of Section 296 of the Election Law of the State of New York is involved, as amended by the terms of Section 191 (a) of the Election Law. Their texts follow:

Section 296.

United States senators. — At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall primary election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment.

Section 191.

Dates of Primary Elections and General Elections; Time of Opening and Closing Polls.

1.a. A primary election, to be known as the spring primary, shall be held in the year 1966 and annually thereafter, on the third Tuesday in June before the general election. All of the provisions of law relating to the spring and fall primary elections shall apply to the spring primary election provided for by this paragraph as hereby amended. All references to the spring and fall primary elections contained in this chapter shall be construed as references whenever appropriate and applicable, to such spring primary election.

Questions Presented

Whether Section 296, as modified by Section 191 (a), of the Election Law of the State of New York violates the provisions of Article 4, Section 4, and the terms of the Seventeenth Amendment, to the Constitution of the United States. The text of the Seventeenth Amendment follows:

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: PROVIDED, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Statement of the Case

On June 5, 1968, ROBERT F. KENNEDY, then junior United States Senator from the State of New York was shot in the Ambassador Hotel in Los Angeles, California. He died at the Good Samaritan Hospital, Los Angeles, the next day, June 6, 1968. As a result of his death, the office of United States Senator from New York became vacant.

Neither of the defendants, appellees herein, took any steps to comply with the Seventeenth Amendment's vacancy provisions respecting the election to office of a successor United States Senator. They announced in newspaper interviews that an appointment under Section 296, as modified by Section 191 (a), of the New York Election Law, would be made shortly.

Accordingly, on July 16, 1968, the plaintiff, DR. JOSEPH A. F. VALENTI, Assistant Dean of St. John Fisher College, Rochester, New York, brought suit against the Governor and Secretary of State under the Civil Rights Act demanding injunctive relief and compelling an election to fill the vacancy on or before November 5, 1968.

On July 17th, in Manhattan, one RANDOLPH PHILLIPS filed the same suit, and on July 19th, one GEORGE BACKER filed the same suit, both in the Southern District of New York.

On July 29th, Chief Judge Henderson of the Western District ordered the convocation of a three-judge panel pursuant to 28 United States Code 2281 et. seq., and denied motions for consolidation of the suits in the Western District.

On July 31st, Chief Judge J. EDWARD LUMBARD assigned Chief Judge HENDERSON and Southern District Judge MARVIN E. FRANKEL to sit on the three-judge Court, and, in addition, fixed August 7th, 1968 as the time

for oral argument of all the lawsuits, such argument to occur at Foley Square, in the City of New York, New York. The argument was so held.

On September 23rd, 1968, plaintiff herein asked for an order to show cause in the form of interlocutory relief directing defendants to prepare for the possibility of an election on November 5, 1968. The request was made first to JUDGE HENDERSON, who declined to entertain it, and next to JUDGE LUMBARD, who never acted upon it. Plaintiff awaited a decision on whether the Court would direct a prompt election to fill the Senate vacancy until October 27, 1968. At that time, he sent a petition and motion to this Court asking for leave to file an application for the issuance of an extraordinary writ of mandamus on the ground that, by delay, the Court was ruling against the plaintiff without enabling him to appeal from an order or decree to that effect. The motion and petition was filed on October 29, 1968. See Miscellaneous No. 1065, October Term, 1968. The decision on November 13, 1968 in the principal case mooted the mandamus motion.

The Questions Are Substantial

From the complaint and the opinions in this case, it is clear that what is involved is the first judicial scrutiny of the vacancy paragraph of the Seventeenth Amendment to the Constitution of the United States in the federal courts. All fifty states have statutes which, by the great variety in their terms, attest to the need for a judicial interpretation of the Seventeenth Amendment in this Court. No other tribunal can supply the needed uniformity of interpretation which a decision of this Court automatically requires. Questions of this magnitude are obviously entitled to plenary hearing with briefs and oral argument.

CONCLUSION

Appellant respectfully prays that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

DATED: November 18, 1968

Respectfully submitted,

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